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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-20

JIM FITZGERALD,

Petitioner,

v.

INTERMOUNTAIN FARMERS ASSOCIATION

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OCTOBER TERM, 1978

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JIM FITZGERALD,

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v.

INTERMOUNTAIN FARMERS ASSOCIATION

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

This brief is filed in opposition to Petition for Writ of Certiorari which was served upon Respondent on July 3, 1978. For the reasons hereinafter set forth, the said Petition is not timely, not reviewable and in all events is without merit.

STATEMENT OF MATERIAL FACTS

Petitioner has not chosen to certify any documents whatsoever to this Court in connection with this case, but rather relies entirely upon its Petition for Writ of Certiorari, to which is attached as appendices a copy of the decision of the Supreme Court of Utah and its subsequent Orders denying Petitioner's Motion to Disqualify one of the members of the Court, and denying Petition for Rehearing. There is attached as Appendices to this Response

a copy of the Motion to Disqualify which was filed with the Supreme Court of Utah on February 17, 1978 (Appendix A), a copy of the Order dated February 27, 1978, denying the Motion to Disqualify (Appendix B), and a copy of the Memorandum of Law filed before the Supreme Court of Utah by Respondent which sets forth reasons why there were no grounds for disqualification under Utah law (Appendix C). These items speak for themselves, and there is no need to go beyond them for a dispositive ruling here. However, Petitioner has chosen to expand that record with certain statements not contained in the record, including wholly unsubstantiated hearsay statements by some unidentified person who supposedly in reading a newspaper called to the attention of Petitioner certain alleged facts (Petition, p. 9). Certain other statements not supported in the record are also set forth in the Petition (see Petition at pp. 4, 5, 10), but although such are immaterial and in fact not supported or supportable, even in the presence thereof there is no valid factual foundation laid for reversing the decision of the Supreme Court of Utah.

The operative facts are:

• Judge J. Duffy Palmer was selected to sit by appointment as one of the five members of the Supreme Court of Utah, under well recognized and challenged procedure for filling a vacancy in the hearing of particular cases.

• Petitioner and/or his counsel knew that Judge Palmer was sitting as a member of the Court before its initial decision and made no objection (Petition, p. 5).

• Petitioner filed a Motion to Disqualify Judge Palmer on February 17, 1978 (attached Appendix A).

• Respondent filed a Memorandum of Law opposing the Motion (attached Appendix C).

• An oral hearing before the Supreme Court of Utah occurred before the full five man Supreme Court of Utah on February 27, 1978.

• The asserted grounds for disqualification of Judge Palmer were as follows:

— Violation of the Constitution of the State of Utah, Article XIII, Section 13.[1]

— Violation of a provision of Utah law[2]

— Violation of a rule of Utah procedure.[3]

• On February 27, 1978, the Supreme Court of Utah entered an Order denying the Motion to Disqualify Judge Palmer. (The said Order is attached as Appendix B to the Petition for Writ of Certiorari, and also as Appendix B to this Brief in Opposition.)

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[1]The Constitution of the State of Utah, Article VIII, Section 13, reads as follows:

> Except by consent of all parties, no judge of the Supreme or inferior courts shall preside in the trial of any cause where either of the parties shall be connected with him by affinity or a consanguinity within the degree of first cousin, or in which he may have been of counsel, or in the trial of which he may have presided in any inferior court.

[2]Utah Code Annotated, Section 78-7-1 (2) provides as follows:

> Except by consent of all parties, no justice, judge or justice of the peace shall sit or act as such in any action or proceeding:
>
> (1) . . .
>
> (2) When he is related to either party by consanguinity or affinity within the third degree, computed according to the rules of common law . . .

I.

THE PETITION FOR WRIT OF CERTIORARI IS NOT TIMELY

It is apparent on the face of the Petition for Writ of Certiorari herein that it is not timely, in that it was filed more than 90 days from the date of the Order by the Supreme Court of Utah here complained of. The Order asserted to be in error was entered February 27, 1978. That is the Order which constituted "refusal of the Supreme Court of Utah" to grant the motion of the petitioner to disqualify one of five judges who was sitting as a member of the Utah Supreme Court (Petition, p. 1). The Petition

[3]Rule 63(b), Utah Rules of Civil Procedure provides:

> (b) Whenever a party to any action or proceeding, civil or criminal, or his attorney shall make and file an affidavit that the judge before whom such action or proceeding is to be tried or heard has a bias or prejudice, either against such party or his attorney or in favor of any opposite party to the suit, such judge shall proceed no further therein, except to call in another judge to hear and determine the matter.
>
> Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed as soon as practicable after the case has been assigned or such bias or prejudice is known. If the judge against whom the affidavit is directed questions the sufficiency of the affidavit, he shall enter an order directing that a copy thereof be forthwith certified to another judge (naming him) of the same court or of a court of like jurisdiction, which judge shall then pass upon the legal sufficiency of the affidavit. If the judge against whom the affidavit is directed does not question the legal sufficiency of the affidavit, or if the judge to whom the affidavit is certified finds that it is legally sufficient another judge must be called in to try the case or determine the matter in question. No party shall be entitled in any case to file more than one affidavit and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.

herein makes it abundantly clear that the refusal of the Supreme Court of Utah here attacked was "denial of petitioner's motion to have disqualified a member of the court" (Petition, p. 2). For convenience in reference, the said Motion to Disqualify is attached hereto as Appendix A, and the Order of February 27, 1978, denying said Motion is attached hereto as Appendix B.

It is equally clear from the Petition for Writ of Certiorari that even though a Petition for Rehearing of the decision of the Supreme Court of Utah was filed subsequent to (later on in the same day) the Order of the Supreme Court of Utah which denied the Motion to Disqualify, there was nothing in that Petition for Rehearing calculated to cause disqualification of the judge in question. The said Petition for Rehearing contained recitations of alleged errors of fact and law, which Petitioner admits were not calculated to produce a decision of disqualification, but rather were "immaterial on the question of whether Judge Palmer should have been disqualified . . ." (Petition, p. 12).

The Motion and Affidavit in support thereof, which set forth the claimed "familial relationship" aimed at causing disqualification of Judge Palmer were dispositively ruled upon and rejected on February 27, 1978, after an oral hearing and the filing of a Memorandum of Law by Respondent (attached hereto as Appendix C). Since this Petition for Writ of Certiorari was served upon counsel for Respondent on July 3, 1978, it was over a full month late.

II.

THE PETITION FOR WRIT OF CERTIORARI DOES NOT SET FORTH GRIEVANCES REVIEWABLE BY THIS COURT

The Motion of Petitioner addressed to the Supreme Court of Utah did not assert or claim any violation of the United States Constitution. Rather, the asserted claim was alleged existence of bias and prejudice under the Constitution of the State of Utah, a statute of the State of Utah, and a rule of procedure of the State of Utah. (See attached Appendix A and Footnotes 1, 2 and 3 herein.) Respondent filed a Memorandum of law with the Supreme Court of Utah which demonstrated the lack of merit under the Utah law as to all of the aforesaid claims (attached Appendix C). There is no claim or intimation now asserted in the Petition for Writ of Certiorari that the Utah Constitution, statute or rule relating to judicial disqualification offends or otherwise violates the Constitution of the United States. To the contrary, it now appears from the Petition for Writ of Certiorari that the prior arguments urged before the Supreme Court of Utah have been abandoned, since admittedly the claimed bias and prejudice "does not fit precisely into a proscribed situation or relationship . . ." (Petition, p. 6). Since neither the Utah Constitution nor its law or procedural rule is claimed to violate Petitioner's "due process of law," it is difficult to understand how action by the Supreme Court of Utah in affirming the admitted fact that bias and prejudice do not exist under such provisions could violate anyone's due process of law. The correct and unchallenged action of the Supreme Court of Utah in interpreting Utah's Constitutional and statutory provisions

could not constitute "state action" for review by the United States Supreme Court, nor could such by a bootstrap argument somehow be said to have enunciated some prohibited rule of law relative to bias or prejudice. The action of the Supreme Court of Utah could only be said to constitute denial of Petitioner's Motion, which itself only called for application of the facts under provisions of State law.

It is submitted that the highest court of a state is the sole judge and interpreter of the State's Constitution, Statutes and Rules of Procedure, and that this Court will not review alleged grievances which are within the cognizance of the highest court of the individual states. As stated in *Herb v. Pitcairn,* 324 U.S. 117, 125, 126, 89 L.Ed 789 (1945):

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Murdock v. Memphis,* 20 Wall (U.S.) 590; *Berea College v. Kentucky,* 211 U.S. 45; *Enterprise Irrigation District v. Farmers Mutual Canal Co.,* 243 U.S. 157; *Fox Film Corporation v. Muller,* 296 U.S. 207. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion."

Since no federal rights were at issue before the Utah Supreme Court of Utah, and since the Supreme Court of Utah correctly applied and interpreted provisions of state law, which unchallenged provisions of state law are not here under review, it is submitted that the alleged grievances are not reviewable by this Honorable Court.

III.

PETITIONER HAS FAILED TO RAISE A CONSTITUTIONAL ISSUE

Petitioner urged his Motion for an Order Disqualifying Judge Palmer on the basis of an alleged bias and prejudice because of a prohibited familial relationship pursuant to Article XIII, Section 13, Constitution of the State of Utah, a Utah statute, Utah Code Annotated, 17-7-1(2) (1953) and Rule 63(b) of the Utah Rules of Civil Procedure (see attached Appendix A and Footnotes 1 2 and 3). That Motion was denied unqualifiedly by the Supreme Court of Utah on February 27, 1978 (attached Appendix B). In his Petition for a Writ of Certiorari in this matter, Petitioner has conceded the technical correctness of the Order of the Utah Supreme Court by recognizing that Judge Palmer did not "fit precisely into a proscribed situation or relationship" as is defined in the aforesaid provisions of Utah law (Petition, p. 6).

This Court has recognized that matters of judicial qualification relating to kinship are within the discretion of the legislature, and absent a challenge to the constitutional validity of the statutes and provisions relied upon by the

Utah Supreme Court in denying Petitioner's Motion, Petitioner has failed to raise a constitutional issue. In *Tumey v. Ohio,* 273 U.S. 510, 522, 71 L.Ed 749, 47 S. Ct. 437, 50 A.L.R. 1243 (1926) this Court recognized that:

> All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interests would seem generally to be *matters of legislative discretion.* (Emphasis added.)

IV.

THERE WAS NO CONSTITUTIONALLY PROHIBITED BIAS OR PREJUDICE NOR THE APPEARANCE THEREOF IN THE CIRCUMSTANCES OF THIS CASE.

The provisions of Utah law relating to judicial disqualification which Petitioner urged before the Supreme Court of Utah as having been violated establish an objective standard by which disqualification is determined.[4] Under such objective standard, even assuming the truth of allegations presented in the Petition for Writ of Certiorari, a reasonable person would not infer that prejudice or bias existed, thereby foreclosing impartiality of judgment. See *Parrish v. Board of Commissioners of Alabama State,* 524 F4.2d 98 (5th Cir. 1975); *U.S. v. Corr,* 434 F. Supp 408 (S.D.N.Y. 1977). Even as related to the provisions of Utah law set forth in Petitioner's Motion to Disqualify (attached

[4]Canon 3C(1)(d) of the Judicial Code of Ethics, adopted by the Utah Supreme Court on March 1, 1974, also sets forth an objective, rather than subjective standard by which judicial disqualification is determined. See also 28 U.S.C. 455 (as amended 1974) and P.L. 93-512, House Re/No. 93-1453 4(1974).

Appendix A and Footnotes 1, 2 and 3), no factual foundation was established for disqualification of Judge Palmer on the basis that his "impartiality might reasonably be questioned" A fortiori, there is no basis for a new challenge here that there was violation of due process of law under the United States Constitution.

In his Memorandum Decision on Recusal in *Laird v. Tatum,* 409 U.S. 824, 837, 34 L.Ed 2d 50, 93 S. Ct. 7 (1972), Justice Rehnquist recognized with approval the unanimous conclusion of federal courts of appeal that a federal judge has a duty to sit where not disqualified, which is equally as strong as the duty not to sit where disqualified.

It is clear that under the only asserted state constitutional, statutory and regulatory provisions presented to the Supreme Court of Utah and argued there, no bias or prejudice could be asserted because under the circumstances of the case "the judge does not fit precisely into a proscribed situation or relationship" (Petition, p. 6). It is equally clear, even under Petitioner's allegations, that the judge does not fit into a proscribed violation of the due process clause.

CONCLUSION

For the reasons aforesaid, it is submitted that the Petition for Writ of Certiorari was not timely filed, such is not reviewable by this Court, and such does not present a constitutional issue nor establish constitutionally reviewable bias and prejudice. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Salt Lake City, Utah 84133
Attorneys for Intermountain Farmers Association

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF UTAH

INTERMOUNTAIN FARMERS ASSOCIATION, a Utah corporation,
Plaintiff and Appellant,

- vs -

JIM FITZGERALD,
Defendant and Respondent.

Supreme Court
No. 14723

MOTION FOR AN ORDER DISQUALIFYING J. DUFFY PALMER, DISTRICT COURT JUDGE, AND FOR REHEARING

Based upon the affidavit of bias and prejudice attached hereto and pursuant to the Constitution of the State of Utah, Article XIII, Section 13: §78-7-1(2), Utah Code Annotated (1953); and Rule 63(b) of the Utah Rules of Civil Procedure, defendant and respondent herein, Jim Fitzgerald, moves that this court enter an order disqualifying J .Duffy Palmer, district court judge, from the above-entitled matter and granting defendant and respondent a rehearing pursuant to Rule 76(e) of the Utah Rules of Civil Procedure.

This motion for rehearing is based upon the affidavit of bias and prejudice filed this date by counsel for defendant and respondent. The right of defendant and respondent pursuant to Rule 76(e) of the Utah Rules of Civil Pro-

cedure to file a petition for rehearing and brief in support thereof is hereby expressly reserved. By order of this court, the petition for rehearing and brief may be filed on or before February 27, 1978.

Dated this 17th day of February, 1978.

Thomas R. Blonquist
Attorney for Defendant
and Respondent
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Metropolitan Law Building
Salt Lake City, Utah 84111
Telephone: (801) 533-0525

The undersigned hereby declares that he caused to be delivered a copy of the foregoing motion to DeLyle Condie, Kennecott Building, Salt Lake City, Utah, and to J. Thomas Greene, 800 Kennecott Building, Salt Lake City Utah attorneys for plaintiff and appellant, this 17th day of February, 1978.

x/2

APPENDIX B

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

February 27, 1978

Office of the Clerk

THOMAS R. BLONQUIST, ESQUIRE
ATTORNEY AT LAW
METROPOLITAN LAW BLDG., 2d FLOOR
SALT LAKE CITY, UTAH 84111

Inermountain Farmers Association,
a Utah corporation,
Plaintiff and Appellant, No. 14723

v.

Jim Fitzgerald,
Defendant and Respondent.

This day respondent's motion for an order disqualifying J. Duffy Palmer, District Judge, and granting rehearing denied.

Geoffrey J. Butler, Clerk

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF UTAH

INTERMOUNTAIN FARMERS ASSOCIATION, a Utah corporation, *Plaintiff and Appellant,* vs. JIM FITZGERALD, *Defendant and Respondent.*	Supreme Court No. 14723

(Memorandum in Opposition to Respondent's Motion for An Order of Disqualification of Judge J. Duffy Palmer)

JUDGE J. DUFFY PALMER WAS NOT AND IS NOT SUBJECT TO DISQUALIFICATION IN THE PRESENT MATTER

Respondent in the above entitled action has filed an Affidavit of Bias and Prejudice asserting that a family relationship between Judge J. Duffy Palmer and Steven Lee Palmer, an employee of appellant Intermountain Farmers Association, gave Judge Palmer a "forejudgment, a bias and a prejudicial opinion in this case, which resulted in leaning toward IFA." (Paragraph 10 of Respondent's Affidavit of Bias and Prejudice.) Of course, the mere filing of such an Affidavit of bias and prejudice does not ipso facto disqualify Judge Palmer. *Haslam v. Morrison,* 113 Utah 14, 190 P.2d 520 (1948) Disqualification of a judge because of family relationship with a party to an action is governed by Article VIII, Section 13, Constitution of the

State of Utah, Utah Code Annotated, 78-7-1(2) 1953, and Rule 63(b), Utah Rules of Civil Procedure. In addition, Canon 3 of the Judicial Code of Ethics adopted by the Utah Supreme Court on March 1, 1974, is pertinent with respect to the guidelines in disqualification of a judge.

The Constitution of the State of Utah, Article VIII, Section 13, reads as follows in this respect:

> Except by consent of all parties, no judge of the Supreme or inferior courts shall preside in the trial of any cause where either of the *parties* shall be connected with him by affinity or a consanguinity within the degree of first cousin, or in which he may have been of counsel, or in the trial of which he may have presided in any inferior court. (Emphasis added.)

Likewise, Utah Code Annotated, Section 78-7-1, reads in pertinent part as follows:

> Except by consent of all parties, no justice, judge or justice of the peace shall sit or act as such in any action or proceeding:
> (1) . . .
> (2) When he is related to either *party* by consanguinity or affinity within the third degree, computed according to the rules of the common law. . . . (Emphasis added.)

In accordance with the above constiutional provision and statute, it is clear that certain requirements must be met before a judge is required to disqualify himself. First, the judge must be related to either *party* to the action. Secondly, such relationship must be either by consanguinity or affinity. Third, such relationship must be within the third degree, as computed according to the rules of common law.

It is admitted that Judge J. Duffy Palmer is the uncle of Steven Lee Palmer, an employee of IFA as set forth in Paragraph 6 of respondent's Affidavit and it is apparent that such relationship is within the third degree of consanguinity as computed according to the rules of common law. However, such a relationship is nevertheless insufficient to require the disqualification of Judge Palmer under the Statutory and constitutional provisions because Steven Lee Palmer is not a party to this action.

The issue of "who is a party" to an action for the purpose of disqualification of a judge has been variously decided. It is generally conceded, however, that a judge who is related to an agent or employee of a party is not disqualified where his relative's duties have no relation to the subject matter of the case. *Vilardo v. Sacramento County,* 54 Cal. App. 2d 413, 129 U.2d 165 (1942). The Code of Judicial Conduct approved by the Utah Supreme Court on May 1, 1974, limits the circumstances requiring disqualification of a judge where a corporation is a party to an action. Canon 3, Paragraph c(1)(d) expressly provides that a judge should disqualify himself in a proceeding where:

> (d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:
>
> (1) is a *party* to the proceeding, or an *officer, director* or *trustee of the party;* (Emphasis added)

Title 28, U.S.C. § 455 (as amended 1974), regarding the disqualification of a federal judge, justice, magistrate or referee in bankruptcy reads identically to the above quoted Code of Judicial Conduct.

It is submitetd that the relationship of officer, director, or trustee of a corporate party is the applicable standard set forth by both the federal rule and the Code of Judicial Conduct as approved by the Utah Supreme Court. This emphasizes the principle that the party to whom the judge is related must have a *direct* interest in the subject matter or the result of the trial; an indirect or uncertain interest is insufficient to require the disqualification of a judge.

Furthermore, it would be going to absurd lengths and would place an unreasonable construction of Article VIII, Section 13, Constitution of the State of Utah, and Utah Code Annotated 78-7-1(2) (1953) to hold that the mere relationship of a judge in a prohibited degree to anyone who may be employed by a corporate party, would result in his disqualification. *Vilardo v. Sacramento County, supra.*

It is respectfully submitted, that under the Constitution and statutes of the State of Utah, as well as the Code of Judicial Conduct, Judge J. Duffy Palmer is not required to disqualify himself in this matter and the Motion of Respondent for an Order of Disqualification should be denied.

Dated this 24th day of February 1978.

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Mailed a copy of the foregoing Memorandum to Thomas R. Blonquist Esq., 431 South Third East, Salt Lake City, Utah, 84111, this 24th day of February 1978.

Received a copy of the foregoing Memorandum this ..... day of February 1978.